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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALEX C. HERNANDEZ et al., Plaintiffs and Respondents, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B206280 (Los Angeles County Super. Ct. No. BC342861)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed in part; conditionally reversed in part and remanded for further proceedings.

Carlson & Messer, Charles R. Messer and Joseph R. Zamora for Defendant and Appellant.

Kazanjian & Martinetti, Ronald Martinetti, Wendy L. Coffelt; Nicholas J. Toghia; Esner, Chang & Ellis, Stuart B. Esner and Holly N. Boyer for Plaintiff and Respondent.

The Los Angeles Unified School District (the District) appeals a judgment entered in favor of Alex Hernandez, Jr. (Alex), an autistic special education student. A jury found Alex was kicked in the groin at school by another student on June 29, 2004, and that the District's negligence was a substantial factor in causing the loss of one of Alex's testicles. The jury awarded Alex $800,000 in damages, which included $500,000 for future medical expenses.

On appeal, the District contends the trial court erred in refusing to compel an independent medical examination (IME) of Alex. (Code Civ. Proc., § 2032.220.) The District also contends the evidence does not support the jury's finding Alex was kicked at school or that the loss of his testicle was caused by trauma and the jury's award of damages for future medical expenses was speculative and excessive.

We conclude any error in the denial of an IME was harmless and that substantial evidence supports the jury's findings on liability, causation and the award of future medical expenses. However, as to the amount of the damages awarded for future medical expenses, we find the trial court erroneously failed to address the merits of the District's motion for new trial. We therefore conditionally reverse the judgment and remand the matter for further proceedings on that issue.

FACTS AND PROCEDURAL BACKGROUND

1. *Alex attends special education classes and is required to have a one-on-one assistant.*

During the spring and summer school sessions of 2004, Alex was a 10-year-old special education student. He had been diagnosed with autism and Williams Syndrome. Commencing in April of 2003, Alex's individualized educational program indicated Alex was required to have a one-on-one support assistant. At the time of the incidents at issue here, no support assistant was assigned to Alex.

2. *The March 3, 2004 incident.*

On March 3, 2004, Alex was kicked in the groin at school by another student named Joshua. Alex's father took Alex to the hospital. Ultrasound performed at the emergency room showed trauma to Alex's testicles but did not show evidence of testicular torsion, i.e., twisting of the spermatic cord which can impede the flow of blood to the testicle. Alex was given Tylenol and ice packs and sent home.

3. *The June 29, 2004 incident.*

When Alex arrived home from school on June 29, 2004, he walked uncomfortably from the bus and reported to his father that he again had been kicked at school by Joshua. Frankie Walker, Alex's babysitter, heard Alex report the incident to his father. Alex's father examined the area and saw "brush marks" that might have been caused by the fasteners or the pocket seams inside Alex's cargo pants. Alex's father returned to work and told Walker to notify him if Alex did not improve with ice and Tylenol.

The next morning, Alex's father went to work and told Walker to let Alex sleep. When Alex awoke, he was in pain and his testicles were swollen. A nurse who examined Alex at an urgent care facility immediately indicated Alex should go to the emergency room.

At the emergency room, the staff observed swelling but no evidence of trauma and suspected torsion. Jacinto Rios, M.D., performed an emergency operation on Alex. Dr. Rios incised Alex's scrotum, "delivered" the left testicle and found no injury to the tunica vaginalis which encases the testicle. Upon opening the tunica vaginalis, Rios found the testicle was black, confirming the suspicion of "intravaginal torsion," which Rios noted in his operation report. Rios untwisted the left testicle, then went to the right testicle because normally this condition affects both testicles. The cord supplying the right testicle was not twisted. Rios anchored each testicle to the wall of the tunica vaginalis to prevent further torsion. Rios found each of Alex's testicles was suspended horizontally, with the spermatic cord attached to the middle of the testicle. Rios testified this condition results in greater mobility of the testicle inside the tunica vaginalis. Rios referred to this condition as Bell-Clapper deformity and testified it is a

"predisposing condition[] for testicular torsion. It's a classical congenital problem that we see."

When asked if trauma caused the torsion, Dr. Rios responded, "No." Rios testified that, had the injury been caused by trauma, there would have been bloody fluid in the tunica vaginalis, not the pink watery fluid (transudate) he found.

Dr. Rios testified the only causes of intravaginal testicular torsion he has encountered are Bell-Clapper deformity, "transverse lie" of the testicle and incomplete descent of the testicle. When one of these conditions is present, torsion can happen at any time, even during sleep. Rios testified the Bell-Clapper deformity cannot be detected by ultrasound and it goes undetected until torsion occurs.

4. *Other trial evidence related to liability and causation.*

a. *School personnel.*

Alex's teachers for the spring and summer sessions of 2004 testified Alex had constant adult supervision and, to their knowledge, had never been kicked or injured at school.

Scott Sondheimer, a special education teacher's assistant, recalled an incident on March 26, 2004, in which Sondheimer "had to pull a student off Alex during a dog-pile or a little bullying that was going on . . . ." However, Alex did not appear to be physically injured as a result of this incident.

b. *Alex.*

Alex testified Joshua kicked him on two different occasions in the private area.

c. *Alex's expert.*

Dudley Danoff, M.D., a urologist, testified the medical records related to the first incident of March 3, 2004, show the presence of blood in the left side of the scrotum. Dr. Danoff indicated such an injury "overwhelmingly" is the result of trauma.

With respect to the injury in June of 2004, the medical records indicate testicular torsion immediately was suspected and an ultrasound showed a blockage of the blood flow to the left testicle. Danoff testified that if a single testicle torsed, only the involved

testicle would become swollen and sore. Alex's bilateral swelling and soreness on June 30, 2004, were consistent with trauma.

Dr. Danoff indicated he has heard the phrase "Bell-Clapper deformity" in the context of this litigation. Danoff testified, "Well, lots of people don't understand how torsion . . . happens, so some clever urologist a number of years ago wrote an article . . . describing what they call the Bell-Clapper deformity; and basically instead of the testicle hanging in a more vertical way it hangs more transversely; and the theory was that by hanging more transversely it can rotate (indicating) more easily. [¶] It's one man's theory. I don't think it holds much water . . . ." Danoff noted there was "no mention of a Bell-Clapper deformity in Dr. Rios's operative note."

When asked if the June 2004 injury to Alex's testicle could have been caused by a kick as well as torsion, Dr. Danoff replied, "Sure, it could. Absolutely." When asked if the injury could have been caused by a kick just as likely as twisting, Danoff answered, "It could. Could be one, could be the other, could be a combination of the two. Sure."

When Alex's counsel asked Dr. Danoff "what would be a medically likely consequence for Alex as he grows older" as a result of the missing testicle, Danoff responded: "He would need exogenous testosterone." Danoff indicated exogenous testosterone could be provided by injection "every two or three weeks." Each injection costs between $30 and $40, plus a charge of between $35 and $40 per office visit. Alternatively, testosterone could be supplied through a testosterone patch or cream. Danoff indicated these methods of "transdermital absorption" were "the newest thing," they were "very effective" but were "very, very expensive" and cost "about $200 a month." Danoff conceded Alex would not need exogenous testosterone if his remaining testicle compensated for the absence of the injured testicle, referred to as compensatory hypertrophy.

5. *The jury's verdict; posttrial motions*.

The jury found the District's negligence was a substantial factor in causing Alex's injury and awarded $42,000 for past economic loss, $500,000 for future medical expenses, $100,000 for past noneconomic loss and $158,000 for future noneconomic loss. The vote was 9-3 on whether the District was a substantial factor in causing harm.

The District filed a notice of intention to move for a new trial on the grounds of excessive damages and insufficient evidence to justify the verdict. The District also filed a motion for judgment notwithstanding the verdict (JNOV) based on insufficient evidence to support the finding Alex's injury was caused by a kick. The trial court dismissed both motions as untimely.

CONTENTIONS

The District contends the trial court erroneously denied its pretrial motion to compel an IME of Alex. The District further contends the evidence does not demonstrate Alex was kicked in June of 2004 and, even if it is assumed he were kicked, there was no evidence to a reasonable medical probability that trauma caused Alex's injury. The District also contends the evidence is insufficient to support an award of future medical expenses and the award of $500,000 for future medical expenses is excessive.

DISCUSSION

1. *No error in the denial of the District's motion to compel an IME*.

a. *Facts related to the IME*.

The trial court held three pretrial hearings on the District's motion to compel an IME of Alex by board certified urologist Fred Kuyt, M.D. The stated purpose of the IME was to determine whether Alex had Bell-Clapper deformity. In support of the motion, Dr. Kuyt indicated the examination would include palpation of Alex's testicles, would not last more than 15 minutes, no procedure causing pain or discomfort would be conducted and Alex's parent or guardian could be present.

Alex objected to the IME on the ground Dr. Kuyt was not a pediatric urologist and he had no experience with disabled children. Further, the District failed to show good cause for the examination, which assertedly would be "painful, protracted or intrusive." (Code Civ. Proc., § 2032.220, subd. (a)(1).)[1] Alex's father indicated Alex would be "extremely agitated, fearful and humiliated" by the examination proposed by the District.

At the first hearing on the matter, the trial court indicated the District might be entitled to an IME but advised the District it would have to explain "exactly what . . . this exam is going to consist of and what it is that you're looking for . . . ."

In a supplemental declaration, Dr. Kuyt indicated he had examined more than 1,000 minors and a psychologist employed by the District had agreed to consult with Kuyt as to how best to examine Alex without causing apprehension.

At the second hearing, the trial court noted Dr. Kuyt's declaration did not indicate "what is it about a palpation of this young autistic man's testicles that [demonstrates the condition is] congenital . . . ?" The trial court continued the matter for further declarations.

Before the third hearing, Alex's counsel informed the District that Alex had an upcoming appointment with a pediatric urologist, Roger DeFilippo, M.D. Alex's counsel attempted to combine the IME and the scheduled pediatric urological examination. However, the District failed to respond.

In advance of the third hearing, Dr. Kuyt submitted a declaration which indicated a healthy testicle typically lies in the scrotum in a vertical line. When Bell-Clapper deformity is present, the testicle lies in a horizontal line and is often located higher than usual in the scrotum. Palpation would allow Kuyt to determine the orientation of Alex's testicle.

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[1] Code of Civil Procedure section 2032.220 provides: "(a) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, if . . . [¶] (1) The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive."

Alex filed opposition expressing concern that palpation could cause harm to the remaining testicle which had been anchored during surgery. Also, an IME would serve no purpose in that Dr. Rios had testified at his deposition that Alex had Bell-Clapper deformity.

The trial court concluded, based on the circumstances of this case and the intrusiveness of the examination, an IME was unnecessary given that Dr. Rios, Alex's treating physician, testified at deposition that Alex had the deformity. The trial court also ruled the District would not be prejudiced by the denial of an IME because it would allow the District "to say at trial that the Court would not allow us to have an exam of the individual . . . ."

b. *The District's argument*.

The District contends it was entitled to have Alex submit to an IME without a showing of necessity because Alex placed his physical condition at issue. (Code Civ. Proc., § 2032.220.) Further, the proposed examination cannot be considered intrusive or a possible source of concern for Alex's remaining testicle given that Alex submitted to a urological examination by Dr. DeFilippo which included palpation of this testicle.

The District complains that, after Alex avoided an IME by conceding he had the Bell-Clapper deformity, he argued to the jury at trial he did not have the deformity and that Dr. Rios did not specifically mention the deformity in the operation report. Alex's counsel told the jury Dr. Rios had at least four opportunities to write down "this very, very exotic Bell-Clapper [d]eformity but he never mentions it anywhere . . . ." Alex's counsel also quoted Dr. Danoff's testimony that Bell-Clapper deformity was "just one man's theory" which he did not think "held water." The District asserts an IME would have made these improper strategies impossible.

The District concludes that, given the limited scope of the requested examination and the fact Alex allowed another physician to conduct the same examination, it was an abuse of discretion for the trial court to find the IME involved an intrusive procedure. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 260.)

c. *Resolution.*

Where a plaintiff seeks recovery for personal injuries, each defendant in entitled to one IME of the plaintiff provided the examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive. (Code Civ. Proc., § 2032.220, subd. (a)(1).) A trial court enjoys discretion to grant a protective order limiting the scope of discovery where the "burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).)

Here, Dr. Rios's deposition testimony that Alex had Bell-Clapper deformity made any further examination of Alex unnecessary and intrusive under the circumstances. Consequently, the trial court's order was not an abuse of discretion. (See *Pratt v. Union Pacific Railroad Co*. (2008) 168 Cal.App.4th 165, 181.) Rather, the trial court's ruling appears to be an instance of the sound exercise of judicial discretion in balancing the intrusiveness of the requested procedure against the likelihood it would lead to admissible evidence. (Code Civ. Proc., § 2017.020, subd. (a).)

In any event, no different outcome would have obtained had Dr. Kuyt examined Alex and testified Alex had Bell-Clapper deformity. Dr. Rios testified emergency surgery revealed Alex had Bell-Clapper deformity. Rios also testified testicular torsion is not caused by trauma. The District could have corroborated Rios's testimony by introducing the testimony of its expert, Dr. Kuyt, who would have testified testicular torsion does not occur in the absence of Bell-Clapper deformity.[2] However, the District apparently was satisfied with Rios's testimony and chose not to offer Kuyt's expert opinion at trial. Nor did the District refer the jury to the trial court's denial of its request for an IME of Alex as the trial court ruled it could. Given these circumstances, any error cannot be seen as causing the District prejudice.

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[2] Dr. Kuyt's last declaration stated: "Without a Bell-Clapper deformity, trauma cannot cause torsion."

Moreover, although Alex urged the jury to find he did not have Bell-Clapper deformity, he also argued in the alternative that, even if he had Bell-Clapper deformity, the kick aggravated the condition and was a substantial cause of Alex's injuries. Finally, although the District complains Alex reneged at trial on his pretrial admission he had Bell-Clapper deformity, Alex did not admit he had the deformity in connection with the motion to compel an IME. Rather, he admitted Dr. Rios would testify he had the deformity.

In sum, the denial of the District's request for an IME was not an abuse of the trial court's discretion. Further, any error in the denial of an IME was harmless in light of the circumstances presented.

2. *The District's assertions of insufficient evidence to support the jury's findings on liability, causation and an award of damages for future medical expenses uniformly fail.*

a. *Standard of review.*

"Where the appellant challenges the sufficiency of the evidence, the reviewing court starts with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's affirmative burden to demonstrate otherwise. [Citations.]" (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.) In resolving the issue, we apply the deferential "substantial evidence" standard of review. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on other grounds as noted in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) Under this standard, " ' "the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' " (*Bickel v. City of Piedmont, supra,* at p. 1053; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 889; *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1626, fn. 5.) " 'If this

"substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld.' [Citations.]" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.)

With these principles in mind, we turn to the District's contentions.

b. *The evidence supports the jury's finding Alex was kicked.*

The District concedes Alex testified he was kicked by Joshua but argues other pertinent aspects of Alex's testimony were confusing and inconsistent. The District notes Alex testified he was kicked in the "dog pile" incident described by Sondheimer on March 26, 2004, but Sondheimer testified Alex was not kicked in that incident. Alex also testified other kids jumped on him each time Joshua kicked him and Sondheimer pulled other kids off him each time. However, Sondheimer testified he never saw Alex get kicked. In fact, none of Alex's teachers saw Alex in pain or discomfort.

The District further notes the medical records from the second incident show no trauma, whereas the records from the same hospital related to the first incident showed trauma to the testicles but no evidence of torsion. The District concludes the testimony of Alex, his father and his babysitter that he was kicked, does not support the jury's finding Alex was kicked at school.

The District's argument flies in the face of the applicable standard of review. The testimony of a single witness, if believed by the jury, is sufficient to support a factual finding. (See, Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Here, Alex testified he was kicked. This alone would have been sufficient to support the jury's finding.

However, Alex's testimony was corroborated by his father and babysitter who heard Alex report the incident. Alex's father also testified he saw red "brush marks" on Alex's skin in the area of his groin. Clearly, this evidence supports the jury's finding Alex was kicked at school on June 29, 2004.

Because the evidence is sufficient to support the jury's finding, it must be upheld. (*Baxter Healthcare Corp. v. Denton, supra,* 120 Cal.App.4th at p. 369.)

c. *The evidence supports the jury's finding Alex's injury was the result of trauma.*

The District contends there was no substantial evidence to support the jury's determination Alex's injury was the result of trauma. The District notes each of the medical professionals who treated Alex in June of 2004 observed swelling but no hematoma or discoloration, which would have been present had there been trauma. Further, Dr. Rios testified the existence of a hemorrhage can only be determined by surgical exploration and, in performing the surgery, Rios found no hemorrhage or blood in the tunica vaginalis. Although Rios's operation report does not mention Bell-Clapper deformity, Rios explained the reference to "intervaginal torsion" in the operation report indicated the presence of Bell-Clapper deformity. Also, Rios testified he observed the deformity when he operated on Alex.

The District notes Alex's expert, Dr. Danoff, testified only that the injury to Alex's testicle "could" have been caused by trauma. The District argues Danoff's testimony did no more than establish a theoretical possibility of causation. (*Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 403.) The District asserts Danoff's "could" opinion is insufficient to support the finding the District's conduct was a substantial factor in causing Alex's injury in light of the overwhelming medical evidence that indicated there was no trauma to Alex's scrotum in the June 2004 incident. (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205-1206.)

The District's argument is not persuasive. Dr. Danoff's testimony was sufficient to establish a reasonable medical probability the kick to Alex's groin was a substantial factor in his injury. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 976, fn. 11.) Danoff testified Alex's injury was consistent with trauma, specifically, a kick. When asked if the injury could have been caused by a kick as well as torsion, Danoff replied, "Sure, it could. Absolutely." When asked whether the injury could have been caused by a kick just as likely as twisting, Danoff answered, "It could. Could be one,

could be the other, could be a combination of the two. Sure." Danoff indicated one does exclude the other.

The District's citation to *Ortega v. Kmart Corp*. does not advance its argument. *Ortega* was a premises liability case which held: " 'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' [Citation.]" (*Ortega v. Kmart Corp*., *supra*, 26 Cal.4th at pp. 1205-1206.)

Clearly, the evidence in this case established more than speculation or conjecture that Alex's injury was the result of a kick. Alex testified he was kicked in the groin at school, Alex presented with pain and discomfort when he arrived home, and Danoff testified Alex's injury was consistent with having been kicked in the groin. Thus, *Ortega* does not assist the District.

In the other case cited by the District, *Jones v. Ortho Pharmaceutical Corp*., the issue was whether ingestion of the defendant's drug had caused the plaintiff's pre-cancerous condition. *Jones* found the only evidence of causation was "the highly conjectural and ambiguous testimony of [two doctors] that the ingestion of the drug may have had some effect on the development or progression of the disease." (*Jones v. Ortho Pharmaceutical Corp*., *supra*, 163 Cal.App.3d at p. 402.) *Jones* noted that, " '[*I*]*n the absence of factual circumstances of probability understandable to a jury* there must be some scientific testimony that can be interpreted as an inference of hypothetical probability before we can allow a jury to speculate upon the rights of citizens. . . .' " (*Id.* at p. 403, italics added.)

In the words of *Jones*, this case presents a factual circumstance of probability understandable to a jury, namely, whether a kick in the groin was a substantial factor in causing Alex's testicular torsion. The testimony of Alex, his father and his babysitter, combined with Danoff's expert opinion testimony that testicular torsion can be caused by

trauma, clearly is a factual circumstance that differs substantially from determining whether ingestion of a drug caused cancer. *Jones* is factually far afield from the situation presented here.

In sum, the evidence supported the jury's finding Alex was kicked at school and the jury's determination the loss of Alex's left testicle was the result of trauma. For the same reasons, it is clear the trial court did not err in denying the District's motions for nonsuit and directed verdict.[3]

d. *The award of future medical expenses.*

The District argues the evidence did not support the award of any future medical expenses because there was no showing Alex would require care in the future. The District asserts Dr. Danoff testified only that Alex *could* have a testosterone deficiency as a result of losing one testicle. The District claims Danoff did not have an opinion as to whether Alex would require exogenous testosterone and indicated the remaining testicle might compensate for the missing one.

The District further argues the testimony of Alex's father that Alex had become weaker, had lost muscle tone and was small for his age was not an expert opinion and cannot be relied upon to prove Alex had a testosterone deficiency. The District concludes there was insufficient evidence offered to show Alex would experience a testosterone deficiency. (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1151.)

We do not find the District's argument persuasive.

"Civil Code section 3283 states in part that '[d]amages may be awarded . . . for detriment . . . certain to result in the future.' Courts have interpreted this to mean a plaintiff may recover if the detriment is 'reasonably certain' to occur. [Citations.] It is

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[3] The District notes Alex defeated the motion for nonsuit in the trial court by arguing Dr. Danoff testified torsion overwhelming is caused by trauma. However, Danoff only mentioned the word "overwhelmingly" with respect to Alex's injury in March of 2004. The District's observation is correct. However, Danoff also testified Alex's testicular torsion "absolutely" could have been caused by trauma. Thus, notwithstanding the erroneous reference to Danoff's testimony by Alex's counsel, the evidence supports the trial court's denial of the District's motion for nonsuit.

for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. (*Ostertag v. Bethlehem etc. Corp.* (1944) 65 Cal.App.2d 795, 805-806, 807 [award of future damages supported by the evidence where an expert testified ' "I cannot say positively what this boy's future is, but . . . I think it is reasonable to assume he is going to have trouble" ' with his condition].) It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery. [Citation.]" (*Garcia v. Duro Dyne Corp*. (2007) 156 Cal.App.4th 92, 97-98.)

Here, in response to a question from Alex's counsel, Dr. Danoff testified a "medically likely consequence" of the loss of one testicle would be a lifelong need for exogenous testosterone. This testimony is sufficient to support a finding Alex was reasonably certain to require exogenous testosterone in the future. Danoff was not required to state conclusively that exogenous testosterone would be needed. (*Ostertag v. Bethlehem etc. Corp., supra,* 65 Cal.App.2d at pp. 805-806.)

The District argues Dr. Danoff's testimony that Alex would need exogenous testosterone as a medically likely consequence of the loss of one testicle was inconsistent with his subsequent testimony in which he admitted he did not know if it was probable that Alex would have a testosterone deficiency. The District notes that, in response to a question directed at whether Alex's physical development would be adversely affected, Danoff replied, "It might, it might not. I don't know the answer." Also, Danoff testified the remaining testicle "normally" compensates for the loss.

However, neither the quoted testimony nor any of the other answers given by Dr. Danoff amounted to a retraction of his opinion that Alex would need exogenous testosterone as a medically likely consequence of losing one testicle. Further, even assuming Danoff's later answers are inconsistent with his initial opinion regarding the

medically likely consequence of the loss of a testicle, inconsistencies in the evidence are for the jury to resolve. (*Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 878 ["[t]he fact that inconsistencies may occur in the testimony of a given witness does not require that such testimony be disregarded . . . nor does it mean that such testimony is necessarily insufficient to support the verdict. It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony"]; *Weintraub v. Soronow* (1931) 115 Cal.App. 145, 149-150.)

In light of this well settled principle, Dr. Danoff's testimony is sufficient to support the jury's award of future medical expenses to compensate for the loss of the testicle.

The case relied upon by the District, *Scognamillo v. Herrick* is inapt. The issue in *Scognamillo* was whether the plaintiff could recover damages for a second surgery, the necessity of which depended on the result obtained in a first surgery. *Scognamillo* concluded the testimony related to the necessity of the second surgery "could hardly have been couched in more speculative terms" in that the evidence indicated one surgery might alleviate the plaintiff's problems and, even if it did not, a second surgery might be deemed to present too great a risk versus the benefit to be obtained. *Scognamillo* concluded the record did not contain sufficient evidence, based on a reasonable medical probability, to make an award for medical expenses related to a second surgery. (*Scognamillo v. Herrick, supra,* 106 Cal.App.4th at p. 1151.)

Here, it was clear Alex had lost one testicle and Dr. Danoff testified a medically likely consequence of that loss was that Alex would need exogenous testosterone for the rest of his life. Consequently, the evidence supported an award of future medical expenses.

3. *The matter must be remanded to permit the trial court to address the District's claims related to the amount of the award of future medical expenses.*

a. *The District timely filed its motion for new trial.*

The trial court did not address the merits of the District's posttrial motions, finding they were untimely. Generally, absent a posttrial motion, the issue of excessive damages cannot be addressed on appeal. (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) The District contends the trial court improperly found its posttrial motions untimely. It appears the District is correct in this regard.

The judgment was filed on November 27, 2007. Alex's counsel filed a "Proof of service of Judgment" on January 8, 2008. It included a proof of service signed on January 4, 2008, which reflected service of the "JUDGMENT" on the District on December 3, 2007.

On March 4, 2008, the District filed a Notice of Intention to Move for New Trial and a Motion for JNOV. On March 7, 2008, the trial court dismissed the District's posttrial motions finding they were not timely under Code of Civil Procedure sections 629 and 659, citing, inter alia, *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265.

Code of Civil Procedure section 659 provides a motion for new trial must be filed before the entry of judgment, or "2. Within 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest . . . ." Code of Civil Procedure section 629 incorporates these time limitations for a motion for JNOV.

Here, there was no service by the clerk of the court. Thus, the issue presented is whether service of the "JUDGMENT" on the District on December 3, 2007, gave "notice of entry of judgment" and triggered the 15-day time limit. We conclude it did not.

As noted in *Palmer v. GTE California, Inc., supra,* 30 Cal.4th 1265, "Motions for a new trial or for judgment notwithstanding the verdict are subject to strict time limits that begin to run when the party seeking such relief is served with a written *notice of entry of judgment*." (*Id.* at p. 1267, italics added.) *Palmer* specifically held a file-

stamped copy of the judgment will suffice as notice that judgment has been entered; a document entitled "notice of entry" is not required. (*Id.* at p. 1277.)

Here, the only document served on the District was the "JUDGMENT." There was no indication the "JUDGMENT" had been file-stamped and thus the judgment served on the District might have been an unsigned, unfiled copy of the judgment. Because the date of entry of a judgment is the date of filing (Code Civ. Proc., § 668.5), service of the "JUDGMENT," without more, did not provide the District *notice of entry* of judgment and did not trigger the 15-day period for filing the posttrial motion. Consequently, the posttrial motions filed by the District were timely.

b. *The matter must be remanded to permit the trial court to address the merits of the District's motion*.

In ruling on a motion for a new trial made on the ground the damages are excessive, the trial court does not sit in an appellate capacity but as an independent trier of fact. (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 739, disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, fn. 2; *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 414, fn. 28, see *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) Thus, the trial court is not bound by the substantial evidence rule and may grant a new trial if the award is against the weight of the credible evidence.

Our review, on the other hand, is deferential. We do not act de novo; instead, we presume the trial court's ruling and the jury's award are correct and we view them in the light most favorable to the judgment. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614; *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.)

In light of the different functions performed by the trial court and ourselves, the appropriate remedy is to remand the matter to the trial court to permit it to evaluate the District's motion for new trial made on the ground the jury awarded excessive damages for future medical expenses under the appropriate legal standard and make such other orders as may become necessary.

DISPOSITION

The verdicts on liability, causation and damages, except the amount of the award for future medical expenses, are affirmed; the judgment is conditionally reversed and the cause is remanded to the trial court with directions to consider the District's motion for new trial with respect to the amount of the award for future medical expenses and to thereafter make such further orders as are necessary and appropriate. The parties shall bear their own costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.